STATE OF MICHIGAN
IN THE COURT OF APPEALS

KEITH W. MAYBERRY and
JOANNA MAYBERRY, his wife

Plaintiffs/Appellants,

Supreme Court No. 126136
Court of Appeals No. 244162
Lower Case No. 02-039236-NH

V

GENERAL ORTHOPEDICS, P.C.,
A Michigan Professional Corporation,
And WILLIAM M. KOHEN, M.D., Jointly
And Severally.

Defendants/Appellees.
_____/

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126136

DEFENDANTS/APPELLEES' RESPONSE TO PLAINTIFFS APPELLANTS' APPLICATION FOR LEAVE TO FILE APPEAL TO THE MICHIGAN Supreme Court

NOW COME Defendants/Appellees, GENERAL ORTHOPEDICS, P.C. and WILLIAM M. KOHEN, M.D., by and through their attorney, James M. Pidgeon, and hereby submits their Response to the

Application for Leave to File Appeal to the Michigan Supreme Court submitted by Plaintiffs/Appellants.

STATEMENT OF FACTS

Bearing in mind that there exists a two year Statute of Limitations for initiating medical malpractice action pursuant to MCL 600.5805, the following facts are pertinent to this Court's evaluation of Plaintiffs/Appellants' Application for Leave to Appeal.

1. WILLIAM M. KOHEN, M.D., an orthopedic surgeon, treated KEITH MAYBERRY for a broken wrist for the first time on November 2, 1999 and on several occasions thereafter through December 10, 1999.

2. Per MCL 600.5805, the Statute of Limitations applicable to the medical malpractice action subsequently brought by KEITH MAYBERRY would have run, at the latest, on December 3, 2001.

3. A Notice of Intent to File Claim was served on DR. KOHEN by the attorney for KEITH MAYBERRY on June 21, 2000, approximately 18 months before the Statute of Limitations was scheduled to run.

4. A second Notice of Intent to File Claim was served on DR. KOHEN and his professional corporation, GENERAL ORTHOPEDICS, P.C., by KEITH MAYBERRY'S second set of attorneys on or about October 11, 2001, less than two months prior to the date on which the Statute of Limitations was scheduled to run.

5. On March 19, 2002, KEITH MAYBERRY and his wife, JOANNA MAYBERRY, filed their Complaint with the Oakland County Circuit Court, more than three months after the Statute of Limitations had run.

STANDARD OF REVIEW

Defendants herein accept the standard of review set forth in Plaintiffs/Appellants' Application for Leave to Appeal.

LAW AND ARGUMENT

I.

The Court of Appeals' ruling correctly interprets the statutory language set forth in MCL 600.2912b and appropriately affirms the trial court's decision to award Summary Disposition.

MCL 600.2912b provides, in applicable part, as follows:

> (1) "Except as otherwise provided in this section, a person shall not commence an action alleging medical malpractice against a health professional or health facility unless the person has given the health professional or health facility written notice under this section not less than 182 days before the action is commenced."
>
> (6) "After the initial notice is given to a health professional or health facility under this section, the tacking or addition of successive 182 periods is not allowed, irrespective of how many additional notices are subsequently filed for that claim, and irrespective of the number of health professionals or health facilities notified."

Plaintiffs/Appellants claim in this case that the Statute of Limitations applicable to this medical malpractice action, set to expire at its latest in December 2001, was tolled pursuant to MCL 600.5856(d). That Statute, in pertinent part, reads as follows:

> "600.5856 Tolling of Statute of Limitations or Repose. The Statutes of Limitations or repose are tolled in any of the following circumstances:
> (d) At the time notice is given in compliance with the applicable notice perid under Section 2912b, if during that period a claim would be barred by the Statute of Limitations or repose; but in this case, the Statute is tolled not longer than the number of days equal to the number of days remaining in the applicable notice period after the date notice is given."

Reading MCL 600.2912b(6) and MCL 600.5856(d) in conjunction with the each other, the tolling provision does not come into play at all. The second Notice of Intent to File Claim does not serve to toll the Statute at all, since tacking of additional 182 day periods of time is explicitly prohibited by MCL 600.2912b(6).

The tolling provision provided by MCL 600.5856(d) only arises when the Statute of Limitations applicable to the claim asserted would expire during the waiting period imposed by MCL 600.2912b upon the filing of the first Notice.

At the time the initial Notice of Intent was served in this case in June, 2000, the two year Statute of Limitations applicable to medical malpractice actions still had almost 18 months remaining. Taking the longest waiting period available, 182 days, and applying it to the date upon which the initial Notice of Intent was served, at the time of the expiration of

that Notice period in December 2000 the Statute of Limitations still had approximately 1 year to run.

Per MCL 600.5856(d), the circumstances under which tolling may occur do not exist, since the claim would not have been barred by the Statute of Limitations during the waiting period imposed by MCL 600.2912b.

Throughout their Brief in Support of Application for Leave to Appeal, Plaintiffs/Appellants continually claimed that the waiting period imposed by MCL 600.12b precluded them from filing a claim against General Orthopedics and DR. KOHEN until an additional 182 days had expired subsequent to the second Notice of Intent to File Claim.

However, this argument flies directly in the face of the explicit statutory language contained in subsection (6) of MCL 600.2912b which provides:

> "The tacking or addition of successive 182 day periods is not allowed, irrespective of how many additional Notices are subsequently filed for that claim and irrespective of the number of health professionals or health facilities notified."

In Omelenchuk v. The City of Warren, 461 Mich 566-567; 609 NW2nd 177 (2000), this Court had an opportunity to address the issue of when the tolling provision provided by MCL 600.5856(d) comes into play.

In Omelenchuk, supra, this Court stated:

> "The second section of the RJA that pertains to our inquiry is MCL 600.5856(d); MSA 27A.5856(d). The Statutes of Limitations or repose are tolled;
>
> . . . (d) If during the applicable notice period under [MCL 600.2912b; MSA 27A.2912(2)]. A claim would be barred by the Statute of Limitations or repose, for not longer than a number of days equal to the number of days in the applicable notice period after the date notice is given in compliance with [MCL 600.2912(2); MSA 27A.2912(2)]."
>
> Certainly, that provision could not have been written more clearly. However, we first observed that it begins with the words:
>
> If during the applicable Notice period under [MCL 600.2912b; MSA 27A.2912 (2)], a claim would be barred by the Statute of Limitations or repose
> . . .
>
> That clause sets forth the circumstances in which MCL 600.5856(d); MSA 27A.5856(d) is applicable. Thus, if the interval when a potential Plaintiff is not allowed to sue ends before the limitation period ends, i.e., if notice is given more than 182 days before the end of the limitation period, then MCL 600.5857(d); MSA 27A.5856(d) is of no consequence. In that circumstance, the limitation period is unaffected by the fact that, during that period, there occurs an interval when a potential Plaintiff cannot file suit.
>
> If, however, the interval when an potential Plaintiff is not allowed to file suit would end after the expiration of the limitation period (i.e. if notice is given 182 days or less before the end of the limitation period), then MCL 600.5856(d); MSA 27A.5856(d) applies. In that instance, the limitation period is tolled."

Omelenchuk, supra, at 573-575.

The outcome of Omelenchuck was dependent upon which of the waiting periods set forth in MCL 600.2912b applied, the 154 day waiting period or the 182 day waiting period. If the 154 day waiting period applied, then Plaintiffs/Appellants' claim was not timely filed; if the 182 days period was applicable as this Court found, then Plaintiffs/Appellants claim was timely filed.

The Omelenchuck case is cited here for the proposition that unless the Statute of Limitations expires within the waiting period, the tolling provision provided by MCL 600.5856(d) does not come into play.

Since the initial Notice of Intent to File Claim waiting period, no matter which of the waiting periods could be said to apply, either 154 days or 182 days, expired long before (approximately 1 year) the date upon which the Statute of Limitations would bar the filing of MAYBERRY claim, no tolling provision comes into play.

This is true unless additional waiting periods are allowed to be added, which is expressly prohibited by MCL 600.2912b(6) by way of the rather clear language indicating that "the tacking or addition of successive 182 day periods is not allowed, irrespective of how many additional Notices are subsequently filed for that claim and irrespective of the number of health professionals or health facilities notified."

Determining whether the Court of Appeals properly interpreted and applied the Statutes involved in this case, MCL 600.2912b and MCL 600.5856, reference need only be had to this Court's decision in Roberts v. Mecosta County General Hospital, 466 Mich 57; 642 NW2nd 663(2003).

Roberts, supra, dealt with a situation in which Plaintiff had invoked a shot gun method of naming Defendants as well as, apparently, filling in blanks for each of the categories necessarily completed for each of the Notice of Intent categories set forth in MCL 600.2912b. The issue that arose is whether Plaintiff had properly put Defendants on Notice of the nature of the claim it intended to assert by way of its future Complaint for medical malpractice against Defendants and, if not, whether Defendants were entitled to Summary Disposition based upon the expiration of the Statute of Limitations because the failure to comply with MCL 600.2912b did not give rise to the tolling benefit provided by MCL 600.5856(d). The Plaintiffs/Appellants shot gun method apparently did not punch enough of the necessary holes in the Notice of Intent format.

In deciding the manner in which that dispute should be reviewed, this Court stated:

"An anchoring rule of jurisprudence, and the foremost rule of statutory construction, is that Courts are to effect the intent of the legislature. People v. Wager, 460 Mich 118, 123, N 7; 594 NW2nd 487 (1999).

To do so, we begin with an examination of the language of the Statute, Wickens v. Oakwood Health Care System, 465 Mich 53, 60; 631 NW2nd 686 (2001). If the Statute's language is clear and unambiguous, then we assume that the legislature intended its plain meaning and the Statute is enforced as written. People v. Stone, 463 Mich 558-562; 621 NW2nd 702 (2001). A necessary corollary of those principles is that a Court may read nothing into an unambiguous Statute that is not within the manifest intent of the legislature derived as from the words of the Statute itself. Omne Financial, Inc. v. Shacks, Inc., 460 Mich 305, 311; 596 NW2nd 591 (1999).

Section 5856(d) clearly provides that Notices must be compliant with Section 2912b, not just Section 2912b(2) as Plaintiff contrarily contends. Had the legislature intended only the delivery provisions of Section 2912b to be applicable, we presume that the legislature would have expressly limited compliance only to 2912b(2). However, the legislature did not do so. Rather, it referred to all of 2912b.

Since the Statute is clear and unambiguous, this Court is required to enforce Section 5856(d) as written. Stone, supra. As a result, the tolling of the Statute of Limitations is available to a Plaintiff only if all requirements included in Section 2912b are met."

Roberts v. Mescosta County General Hospital, supra, at 63-64.

In this case, Plaintiffs/Appellants filed their lawsuit more than two years subsequent to the date of the alleged malpractice, and now seek to claim that the two year

Statute of Limitations should not apply as it was "tolled" as to their claim.

In order to invoke the tolling provisions of MCL 600.5856(d), however, as this Court noted in Roberts v. Mecosta County General Hospital, supra, tolling is available to a Plaintiff "only if all requirements included in Section 2912b are met."

Subsection 6 of MCL 600.2912b provides that one may not have cumulative 182 day periods of time no matter how many additional claims are levied, nor how many additional health professionals are added.

Construing the requirement of MCL 600.2912b as written demonstrates that Plaintiffs/Appellants have not complied with the Statutory provision set forth in Subsection 6 of that Statute so as to give rise to the tolling provision afforded by MCL 600.5856(d).

The Plaintiff in Roberts v. Mecosta County General Hospital, supra, had contended that Defendants had "waived" their right to challenge whether Plaintiff had adequately complied with MCL 600.2912b and given a waiver, whether Plaintiffs were entitled to a tolling of the Statute of Limitations under MCL 600.5856.

In ruling that no waiver occurred or could have occurred under the circumstances presented, this Court ruled:

> "The plain language of Section 5856(d) clearly requires a medical malpractice Plaintiff to comply with the provisions of Section 2912b in order to toll the limitations period. Absent an express waiver of its right to contest the adequacy of Plaintiff's Notice of Intent or to assert the Statute of Limitations as a defense, Defendant cannot forfeit, or "waive" those rights until the tolling provision becomes an issue. This is because a tolling provision effectively works to negate the Statute of Limitations defense raised by a Defendant. Thus, unless done so expressly, the only way in which a Defendant could effectively "waive" any objection to Plaintiff's fulfillment of the requirements of Section 5856(d) would be to fail to invoke the pertinent Statute of Limitations after a Plaintiff files suit or to fail to object to the adequacy of the Notice of Intent after a Plaintiff advances tolling as a response to a Statute of Limitations defense.
>
> In other words, under this Statute, Defendant's failure to respond to Plaintiff's Notice does not result in a waiver of a Statute of Limitations defense before a suit is even filed. Accordingly, since Plaintiff sought to rely on the tolling provision of 5856(d), and that section plainly requires compliance with Section 2912b, Defendants cannot logically be considered to have waived their right to object to Plaintiff's compliance with Section 2912b before the filing of the suit."

Roberts v. Mecosta County General Hospital, supra, at 67-68.

In the instant litigation, Plaintiffs/Appellants have sought to rely upon the tolling provision provided by MCL 600.5856(d) to avoid Summary Disposition premised upon the expiration of the Statute of Limitations. In order to

successfully rely upon that Statute, however, this Court, as set forth above, has ruled that compliance must be had with MCL 600.2912b.

In this case, Plaintiffs/Appellants have claimed on appeal that a portion of the Statute, compliance with which is mandatory in order to invoke the tolling provisions provided by MCL 600.5856(d) simply should not apply to their claim. As this Court ruled in Roberts v. Mecosta General Hospital, supra, however, parties are not free to pick and choose which portions of that Statute they wish to obey.

Upon this Court's decision in Roberts v. Mecosta General Hospital, supra, the case was remanded to the Court of Appeals for re-hearing to determine whether Plaintiff had "strictly complied" with the provisions of Section 2912b, the Notice of Intent Statute. After determining that compliance was had, the Roberts case came back to this Court under the denomination Roberts v. Atkins, 470 Mich 679, 684 NW2nd 711 (2004).

In re-addressing the issue of compliance when the Roberts case reached it again, this Court stated:

> "Although the Notices of Intent in this case are not wholly deficient with regard to the above requirements, they are nonetheless not in full compliance with Section 2912b because they failed to properly set forth allegations regarding the standard of practice or care applicable to each Defendant . . .

* * *

> Because Plaintiff did not fully comply with the unambiguous requirements of Section 2912b(4), we reverse the decision of the Court of Appeals and we reinstate the judgements of the Trial Court granting Defendants' Motion for Summary Disposition."

Roberts v. Atkins, supra, at 682-683.

To support its ruling, this Court stated:

> "The two year period of limitations for medical malpractice actions is tolled during the Notice period "after the date Notice is given in compliance with Section 2912b. MCL 600.5856(d)(Emphasis supplied). Thus, in order to toll the limitation period under Section 5856(d), the claimant is required to comply with all of the requirements of 2912b."

Roberts v. Atkins, supra, at 686.

In the instant litigation, rather than failing to "comply" with the specific requirements of MCL 600.2912b, Plaintiffs/Appellants are relying on a provision of that Statute that prohibits that which they did - filing cumulative Notices of intent and claiming that they nonetheless should be entitled to the tolling provision provided by MCL 600.5856(d).

The whole idea behind the tolling provision is that compliance with the 182 day waiting period might not be possible without running afoul of the cut off date for the Statute of Limitations. In this case, however, Plaintiffs/Appellants initial Notice of Intent was served on DR. KOHEN roughly 6 months after he had stopped treating KEITH

MAYBERRY, with approximately 1 and ½ years left to run on the two year Statute of Limitations.

On the eve of the expiration of the Statutory period (actually two months before the Statute ran), Plaintiffs/Appellants filed another Notice of Intent and now claim the Statute of Limitations was tolled by having filed a second Notice of Intent.

This is precisely the type of action that the legislature saw fit to preclude when its specifically stated in MCL 600.2912b(6) that "The tacking or addition of successive 182 day periods is not allowed."

Additionally, in MCL 600.5856, the tolling provision comes into play only when the Statute of Limitations would expire during the waiting period imposed by MCL 600.5856(d). In this case, since the Statute was not set to expire for an additional 18 months after the first Notice of Intent was served, the very reason the tolling provision was adopted cannot said to apply here.

Plaintiffs/Appellants Complaint was filed more than 2 years after the date of the alleged malpractice. Therefore, it was time-barred by the applicable Statute of Limitations.

The particular issue as to whether the second Notice of Intent can effectively serve to toll the Statute of Limitations, when the first Notice did not do so, was squarely addressed by the Michigan Court of Appeals in the case of Ashby v. Byrnes, M.D., 251 Mich App 537; 651 NW2nd 922 (2002).

After first setting forth the language of MCL 600.2912b(6), the Court of Appeals stated:

> "First, Plaintiffs argue that the Statute does not apply because under the fact of this case, their initial filing of a Notice of Intent did not effectively result in any tolling of the period of limitations. Plaintiff's note that the period had not expired before Defendants, through their insurance carrier, denied Plaintiff's claim. Thus, Plaintiff's argue that they received no benefit from the Statute granting them a tolling of the running of the limitation period following the filing of their initial Notice of Intent. However, although we recognize that Subsection 2912b(6) specifically prescribes only the tacking of additional or "successive" periods, the overall intent of the language of the Statute is clearly that "the initial Notice" results in a tolling of the limitation period "irrespective of how many additional notices are subsequently filed." The Statute nowhere suggests that this limiting language applies only when the first Notice filing tolled the period of limitations.
>
> Second, Plaintiffs argue that their amended Notice of Intent did not pertain to the same claim referenced in their initial Notice because they added an additional theory of liability against Defendants. Thus, Plaintiffs argue that the language of the Statute regarding "Notices . . . subsequently filed for that claim" is not applicable.

> Again, we disagree with this restrictive reading of the Statute. By its terms, the Statute would clearly apply to an additional Notice that added other "health professionals or health facilities" to a claim originally noticed against an "individual health professional or health facility." If that is the case, which is clearly is, we cannot construe the Statute to be inapplicable when a Notice merely alleges additional theories of liability against an already named Defendant."

Ashby, supra, at 544-545.

Thus, the very issue raised by Plaintiffs/Appellants here, that the addition of a party Defendant serves to re-institute the 182 day waiting period, and entitles them to the benefits of MCL 600.5856's tolling provision, simply runs against case law in existence in the State of Michigan and the legislative intent that has been divined by the Courts that have addressed that issue.

RELIEF SOUGHT

As argued above, Defendants/Appellees respectfully pray that this Court deny Plaintiffs/Appellants' Application.

Respectfully submitted,

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Dated: October 15, 2004.

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PROOF OF SERVICE

Gail J. Spencer, being first duly sworn, deposes and says that she did serve the following document(s) in the manner herein specified:

DOCUMENT(S): **1. Defendants/Appellees' Response to Plaintiffs/Appellants' Application for Leave to Appeal to the Michigan Supreme Court.**

2. **Proof of Service.**

DATE SERVED: **October 15, 2004.**

PERSON(S) SERVED: Michigan Supreme Court
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Gail J. Spencer